Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. ~~79-715~~

NATIONAL STUDENT FILM CORPORATION, a California corporation,

Petitioner,

v.

FENSTER SCHOOL, an Arizona corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA, DISTRICT TWO

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

MILLER, PITT & FELDMAN, P.C.
JAMES R. FIGLIULO
111 S. Church, Tucson, AZ 85701
Counsel for Respondent

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THE ARIZONA COURTS' DETERMINATION THAT STRIKING DEFENDANT'S ANSWER FOR A WILLFUL AND BAD FAITH VIOLATION OF COURT ORDERS COMPELLING DISCOVERY WAS JUSTIFIED BY THE RECORD FACTS.

The petitioner contends that it has been denied due process of law under the Fourteenth Amendment of the United States Constitution. The basis for which the petitioner seeks review is the alleged failure of the State Trial Court to find, before striking petitioner's pleading pursuant to Rule 37(b), Arizona Rules of Civil Procedure, as a sanction for petitioner's refusal to comply with a court order compelling production of certain documents, that petitioner's refusal was willful or in bad faith citing Societe Internationale Pour Participations Industrielles et Commerciales v. Rogers, 357 U.S. 197 (1958). Here,

the record facts readily demonstrate that petitioner's failure to produce the court-ordered documents was willful and in bad faith.

On April 5th, 1977, respondent filed and served a request for production of documents upon the petitioner. Petitioner, through its counsel, Michael Lacagnina, responded to that request with objections. Respondent filed a motion to compel production of certain of the requested documents and a hearing was held. On June 6th, 1977, an order compelling production of certain of the requested documents was issued. Petitioner did not produce any documents as ordered by the Court.

In August, 1977, respondent's counsel sent a letter to counsel for petitioner requesting that petitioner comply with the Court order with respect to production of

documents. Petitioner again did not respond despite Mr. Lacagnina's efforts to persuade him to respond. In October of 1977, Mr. Lacagnina moved to withdraw as counsel for the petitioner. In support of his motion to withdraw, he filed an affidavit stating, among other things, that the petitioner had failed to cooperate with the preparation and defense of the case and had failed to produce the court-ordered documents. Petitioner did nothing to seek relief from any Court order or to comply with the Court order. Again, in April of 1978, counsel for respondent sent a letter to counsel for petitioner, again requesting compliance with the Court order compelling production of the documents. Again, no response was forthcoming from petitioner.

Finally, respondent moved for sanctions requesting that petitioner's answer be stricken

from the records for failure to comply with the Court orders. On the day before trial, petitioner responded by filing an opposition to the motion for sanctions and a non-specific, self-serving memorandum alleging in a conclusory fashion that the documents were unavailable. No facts were set forth as to what, if any, specific efforts were undertaken to produce the requested documents. The petitioner also indicates that the first alleged attempt to find the documents did not occur until more than six to eight months after the Court's order compelling production of the documents.

The Trial Court carefully listened to arguments, received exhibits, reviewed the records and made inquiries about the reasons for the failure to produce. The Court even allowed petitioner's counsel to communicate with petitioner's president and

request he appear before the Court to explain the reasons the Court order was ignored for more than eleven and a half months. The petitioner refused to do anything further.

The Trial Court's order noted specifically:

> "The Court feels there has been a failure to comply with the spirit and letter of the law in complying with discovery and production as indicated by case law and Rules of Civil Procedure." (Minute Entry dated May 23, 1978)

The record facts certainly supported a specific finding of "willfulness" and "bad faith" and the Court's order quoted above certainly implied a specific finding of "willfulness" and "bad faith".

The Court of Appeals affirmed the decision of the Trial Court. In reaching its decision, it cannot be said, as the petitioner suggests, that the Court "rejected" or "ignored" the Rule as set forth by this

Court in Societe Internationale, supra. Quite to the contrary, the Court's justification for its decision was based only on the record facts as were placed before it which, as illustrated above, clearly evidenced no reasonable attempt by the petitioner to comply with the Trial Court's order compelling production of certain documents nor a timely explanation for its failure to do so. It was by reason of petitioner's conduct as a whole that the Trial Court and Court of Appeals ruled as they did.

Societe Internationale, supra, is, on its facts alone, inapplicable here. In that case the Trial Court had made specific findings that the plaintiff's efforts to produce the court-ordered documents were in good faith and that his failure to comply with the Court order was

not willful. This Court stated that the appellant's conceded good faith was a very important factor in its decision. No such evidence of good faith exists here.

The record facts in the case clearly support the decisions reached by the Trial Court and Court of Appeals. Further review by this Court is unnecessary and would be inappropriate. As was stated by the Court in United States v. Johnston, 268 U.S. 220, 227, 45 S.Ct. 496 (1925):

> "We do not grant certiorari to review evidence and discuss specific facts."

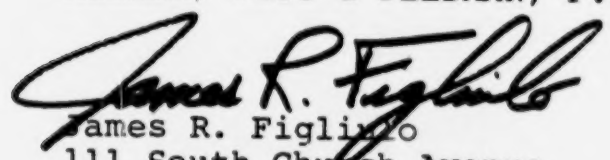
See also, General Talking Pictures Corp. v. Western Electric, et al., 304 U.S. 175, 178, 58 S.Ct. 849 (1938).

Petitioner's right of due process under the Fourteenth Amendment of the United States Constitution has clearly not been violated. The Rule set forth by the Court in Societe Internationale was carefully

applied by both the Trial Court and Court of Appeals in the case. The sanction issued by the Trial Court pursuant to Rule 37(b), Arizona Rules of Civil Procedure, striking the petitioner's pleading was issued only after an inquiry and a determination was made that petitioner's refusal to obey the Trial Court's earlier order compelling production of certain documents was both willful and in bad faith. The action and determination of the Arizona Courts are strongly supported by the record facts. No Constitutional question exists and respondent respectfully requests that petitioner's petition for review be denied.

Respectfully submitted,

MILLER, PITT & FELDMAN, P.C.



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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he mailed two copies of the foregoing Respondent's Brief in Opposition to Petitioner's Petition for Writ of Certiorari on the 14th day of December, 1979, to:

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